

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
CONSUMER BANKERS ASSOCIATION)	CG Docket No. 02-278
)	
Petition for Declaratory Ruling with Respect to)	DA 05-1347
Certain Provisions of the Wisconsin Statutes and)	
Wisconsin Administrative Code)	
)	
Petition for Expedited Declaratory Ruling with)	
Respect to Certain Provisions of the Indiana)	
Revised Statutes and Indiana Administrative Code)	

**REPLY COMMENTS OF CONSUMER BANKERS ASSOCIATION IN SUPPORT
OF ITS PETITIONS FOR DECLARATORY RULING**

The comments filed in response to this Commission’s Public Notice of June 29, 2005, make no new or compelling arguments in opposition to the Consumer Bankers Association (“CBA”) requests for preemption of certain provisions of the telemarketing statutes and regulations of Indiana and Wisconsin.¹ Accordingly, no lengthy reply to those comments is required.

¹ FCC Public Notice, *Consumer & Governmental Affairs Bureau Reopens Public Comment Period For Petitions For Declaratory Ruling Relating to Preemption of State Telemarketing Laws*, DA 05-1347 (May 13, 2005) (published in the Federal Register, 70 Fed. Reg. 37318 (June 29, 2005)). The Public Notice requests additional comment on all of the pending requests for declaratory ruling that the telemarketing regulations of various states should be preempted, including those of the Consumer Bankers Association. Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code, CG Docket No. 02-278 (Nov. 19, 2004)(“Indiana Petition”); Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code, CG Docket No. 02-278 (Nov. 19, 2004)(“Wisconsin Petition”).

The comments of the State of Indiana, however, arguing that the availability of certain automated call-blocking products makes federal preemption of Indiana's telemarketing rules unnecessary, merit a brief response.² As discussed further herein, the availability of call-blocking services does not reduce the burden of compliance with the challenged provisions of Indiana and Wisconsin law and cannot cure the inconsistency between those states' requirements and this Commission's policies.

I. CALL BLOCKING PRODUCTS DO NOT REDUCE THE BURDEN OF COMPLIANCE WITH THE CONFLICTING EBR PROVISIONS OF FEDERAL, INDIANA AND WISCONSIN LAW

Indiana argues that commercially available call blocking products "provide telemarketers with the easy ability to comply with the Commission's Rules, the Federal Trade Commission's Rules, and the various state rules governing telephone solicitations."³ As an example of such a product, Indiana points to "an automated screening service that blocks phone numbers registered on the federal and various state do-not-call lists," and that also offers "a comprehensive database of applicable state rules."⁴

The availability of such products might have some relevance to the CBA's requests for relief if the CBA was seeking preemption of state do-not-call lists, or complaining about the inconvenience of looking up the provisions of the various state telemarketing rules. As Indiana points out, call blocking services offer to expedite legal research and automate the process of blocking outbound calls to telephone numbers that appear on state and federal do-not-call lists. But those services do nothing to reduce the compliance burden posed by the provisions of the

² State of Indiana's Supplemental Comments in Opposition to the Consumer Bankers Association's Petition to Declare Indiana's Privacy Law Preempted, CG Docket No. 02-278 (July 29, 2005) ("Indiana Comments").

³ Indiana Comments at 2.

⁴ *Id.* at 1-2.

Indiana and Wisconsin rules that are the focus of the pending CBA petitions.⁵ Specifically, the CBA seeks preemption of the following provisions of Indiana and Wisconsin law:

- Indiana’s requirement that calls to persons on its state do-not-call (“DNC”) list be made only in connection with “a specific grant of authority made by a residential telephone subscriber at a verifiable date and time”⁶
- Wisconsin’s requirement that calls to persons on the DNC list may be made only in response to the subscriber’s request for a telephone solicitation.⁷
- Indiana and Wisconsin’s refusal to permit an established business relationship (“EBR”) to be based upon completed purchases or transactions.⁸
- Wisconsin’s refusal to permit EBR-based calls for the purpose of promoting products or services that are different from those the called party has a current agreement to receive from the caller.⁹
- The refusal of both states to permit EBRs to be based upon transactions with, or inquiries made to, affiliates of the calling party.¹⁰

Even if the CBA members purchased one or more of the products described in Indiana’s comments, the burden of compliance with the EBR provisions challenged in the pending petitions would be as onerous as before. Only the CBA member -- not a third party vendor -- can determine whether the member’s relationship with a potential called party is based upon a current or completed transaction, or is based upon a transaction with an affiliate, or involves a product or service that is different from the one a proposed telephone call will promote. A

⁵ More generally, such products underscore the need for this Commission to assert its plenary jurisdiction over interstate telemarketing. The fact that a regulatory regime is so confusing and complex that it has created new market opportunities for compliance products and services is not an argument in that regime’s favor.

⁶ Ind. Admin. Code § 11 IAC 1-1-4 (2004).

⁷ Wisconsin Petition at 3.

⁸ Indiana Petition at 4; Wisconsin Petition at 3.

⁹ Wisconsin Petition at 5-6.

¹⁰ Indiana Petition at 4; Wisconsin Petition at 6.

vendor can maintain a database of telephone numbers that meet or do not meet these criteria; but the task of assembling and updating that information must be borne by the party that has the relationship with the customer.

Specifically, the CBA's comments of July 29, 2005 identify the following compliance steps that members must undertake in order to create a list of telephone numbers that meet the Indiana and Wisconsin EBR criteria.¹¹

For calls to Indiana residents:

1. From the residential telephone numbers that the institution is permitted to call under federal law, identify the telephone numbers of residential subscribers that are on the Indiana do-not-call list. Delete from the calling list all telephone numbers that are on the Indiana do-not-call list except the following:
 - a. telephone numbers of subscribers on the Indiana do-not-call list that have given the caller a "specific grant of authority" to call as required by Indiana law; and
 - b. telephone numbers of subscribers on the Indiana do-not-call list that are involved in current, uncompleted transactions with the caller.
2. Delete from the calling list the telephone numbers of subscribers on the Indiana do-not-call list that are not excluded by step 1, but that only have authorized a call from, or are engaged in a current, uncompleted transaction with, an affiliate of the caller.
3. Generate a calling list of Indiana residential telephone numbers that remain after application of steps 1 and 2.

For calls to Wisconsin residents:

1. From a list of residential telephone numbers that the caller is permitted to call under federal law, identify the telephone numbers of residential subscribers that are on the Wisconsin do-not-call list. Delete from the calling list all telephone numbers that are on the Wisconsin do-not-call list, except:

¹¹ Comments of Consumer Bankers Association in Support of Its Petitions for Declaratory Ruling, CG Docket No. 02-278 at 10-11 (July 29, 2005) ("CBA Supplemental Comments").

- a. the telephone numbers of subscribers on the Wisconsin do-not-call list that have requested a telephone solicitation as defined by Wisconsin law; and
 - b. the telephone numbers of subscribers on the Wisconsin do-not-call list that are “current clients” of the caller as defined by Wisconsin law.
2. Identify the telephone numbers on the Wisconsin do-not-call list that are not excluded by step 1, but where the proposed call concerns a product or service different from any product or service the subscriber has a current agreement to receive from the caller. Remove numbers so identified from the calling list.
3. Remove from the calling list the telephone numbers of subscribers on the Wisconsin do-not-call list that are not excluded by steps 1 and 2, but that only have authorized calls from, or are current clients of, an affiliate of the caller.
4. Generate a calling list of Wisconsin residential telephone numbers that remain after application of steps 1 through 3.

The various call-blocking services are of no assistance with these processes.¹² In fact, those services are only useful if the CBA members, confronted with the burden, risk and uncertainty of compliance with the restrictive Indiana and Wisconsin EBR provisions, elect simply to block all outbound interstate calls to telephone numbers on the Indiana and Wisconsin DNC lists. In that case, the cost of compliance is not avoided, but is measured by the lost revenue that could have been earned from calls that are entirely lawful under the Telephone Consumer Protection Act and this Commission’s rules, but that are prohibited by the wrongful interstate application of conflicting state law. Blocking applied in this automated fashion also

¹² As the CBA points out in its comments of July 29, 2005, the burden of compliance is exacerbated by the vagueness of the Indiana and Wisconsin statutes, which require member personnel to determine when a customer inquiry, transaction or relationship satisfies the ill-defined parameters of conflicting state EBR definitions. CBA Supplemental Comments at 11-12. Those uncertainties are compounded when calling decisions cannot be made centrally, but must be delegated to member institution personnel and made on a call-by-call basis. *Id.* No automated, software-directed product can substitute for human judgment in those cases or reduce the legal risk posed by later, regulatory second-guessing of those decisions.

would be contrary to the wishes of the customer, who may expect the company to return the call or to complete the transaction as contemplated in the exemptions written into these state laws.

II. CALL BLOCKING PRODUCTS, EVEN IF EFFECTIVE, CANNOT CURE THE INCONSISTENCY BETWEEN THE INDIANA AND WISCONSIN RULES AND THE POLICY OF CONGRESS AND THE COMMISSION

As the CBA has pointed out in its various filings in this proceeding, the fatal inconsistency between Indiana and Wisconsin law and the rules of this Commission is not primarily a matter of cost and inconvenience. Even if the call blocking products described by the State of Indiana made compliance costless and effortless -- as they certainly do not -- the failure of Indiana and Wisconsin to recognize the federal EBR exception for interstate calling prevents the realization of two federal policies: (1) the determination that interstate telemarketing calls to existing customers are in the public interest; and (2) the determination that businesses should not be subject to conflicting obligations when they make interstate telephone calls.¹³ These policies, which are reflected unambiguously in this Commission's rulemaking decisions in this case, cannot be achieved if more restrictive EBR definitions can be imposed upon interstate calls. As the CBA pointed out in its comments of July 29, 2005, if all states follow the same course as Indiana and Wisconsin, *not a single telemarketing call in the United States would be governed by the Commission's EBR exemption and the careful policy decisions that that exemption represents.*¹⁴ This absurd result cannot have been the intent of Congress when it passed the Telephone Consumer Protection Act, and it certainly was not the intent of this Commission when it set out to establish a "consistent, uniform system" of interstate telemarketing regulations.

¹³ See, e.g., CBA Supplemental Comments at 3-7.

¹⁴ *Id.* at 7.

CONCLUSION

Indiana's suggestion, that the fundamental conflict between federal law and conflicting state EBR restrictions can be cured by the affected parties' purchase of a software product, must be rejected. With that final claim put to rest, the record in this proceeding now is more than sufficient for the Commission to reach a decision on requests for relief that have been pending for nine months. The CBA urges the Commission to assert its jurisdiction over interstate telemarketing by granting the pending petitions without further delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2005, a copy of the foregoing **REPLY COMMENTS** was served by electronic mail, or U.S. First Class mail, as indicated, upon the following:

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